

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND COURT APPEAL NO. E001 OF
2023

DINAH KERUBO MOGAKA.....1ST

APPELLANT

ISAU KIGANANE.....2ND

APPELLANT

VERSUS

HELLEN KWAMBOKA MOGAKA.....1ST

RESPONDENT

SPIRIM KWAMBOKA OLOO.....2ND

RESPONDENT

LAND REGISTRAR, MIGORI.....3RD

RESPONDENT

***(Being an Appeal against the ruling of Hon. Areri (PM)
delivered on 30th November 2022 in Migori CMELCC No. 3
of 2018)***

JUDGEMENT

- 1.** By way of an Application dated **25/04/2022**, the Appellants herein sought the following orders in the trial court;
 - 1) Leave be and is hereby granted to the Plaintiff to amend their plaint in terms of the annexed further amended plaint and the annexed further amended plaint be deemed duly filed upon payment of requisite fees.**
 - 2) The costs of the application be in the cause.**

2. The Respondent filed a replying affidavit dated 09th May 2022 sworn by Spirim Kwamboka Oloo. He deponed that the applicant did not disclose to the court that the grant had been confirmed in regard to the succession proceedings. Further, that the Applicant concealed the existence of the grant from 2014 to 2021 because they knew that they had misled the court that LR No. SUNA EAST/KAKRAO/235 belonged to the estate of the deceased therein. He urged that there was nothing new which would warrant the grant of the prayers sought.
3. The parties were directed to file submissions on the application. Upon consideration of the submissions and the pleadings, the trial court dismissed the application vide the ruling delivered on 30/11/2022.
4. Being aggrieved with the ruling of the court, the appellants instituted the present appeal vide a Memorandum of Appeal dated 18th January 2023 premised on the following grounds;
 - 1) **The learned trial magistrate failed to consider and appreciate the uncontroverted facts placed before him, to wit, that land title L.R. No. Suna East/Kakrao/235 was by Order issued on 31st March, 2022 struck out of the list of properties forming the estate of the late Mogaka Obare to be administered on account of an application dated 5th October, 2021 presented by the 1st and 2nd Respondents.**
 - 2) **The learned trial magistrate erred by failing to consider and to hold that the filing of the application dated 25th April, 2022 by the appellants**

was a bona fide and lawful bid to align the plaint with the factual position wrought about by the Order of court of 31st March, 2022.

- 3)The learned trial magistrate erred by failing to consider and to hold that he had a wide discretion to allow the application dated 25th April, 2022.**
- 4)The learned trial magistrate erred by failing to consider and to hold that an application for amendment can be presented at any stage of the proceedings and that the respondents had not demonstrated that the prejudice they would have suffered could not have been remedied by an award of costs.**
- 5)The learned trial magistrate erred by taking into account irrelevant considerations.**
- 6)The learned trial magistrate failed to appreciate the tenor, meaning and import of Article 159(2) of the Constitution of Kenya, 2010.**
- 7)The learned trial magistrate failed to take into account the relevant factor that the respondents had not even began testifying and that any prejudice which could be sustained (which was unspecified) was in any event capable of being remedied by way of costs.**
- 8)The learned trial magistrate failed to consider and to hold that the proposed amendment did not have the effect of changing the nature of the case**

considering facts which had been tendered in evidence on 14th July, 2020.

- 9)The learned trial magistrate failed to consider the fact that the suit before her incorporated a land claim by the applicant and that as a result the appellants risked losing property rights on a mere technicality in the event that the application was refused.**
- 10)The learned trial magistrate failed to consider that the risk of refusal of the application dated 22nd April, 2022 far outweighed any risk of prejudice which the respondent might have been exposed to by allowing the said application.**
- 11)The learned trial magistrate failed to consider and to hold that the proposed amendment was only meant to align the pleadings to facts which became known to the applicant at the hearing of this suit on 14th July, 2020.**
- 5.** The parties were directed to file submissions on the Appeal. The appellant filed submissions dated 26th March 2025 whereas the Respondents filed submissions dated 25th June 2025.

Appellants' submissions

- 6.** Learned counsel for the appellant submitted that the learned trial magistrate failed to consider the grounds for seeking amendment. He urged that the Court of Appeal in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited (2012) eKLR* restated the law applicable to amendment of pleadings

as stated in Bullen and Leake & Jacob's Precedents of Pleadings - 12th Edition and captured in the Court of Appeal decision in Joseph Ochieng & 2 others v First National Bank of Chicago, Civil Appeal No. 149.

- 7.** Counsel submitted that the amendment sought by the appellants was brought about by the application for revocation of grant filed by the 1st and 2nd respondents. That they sought to have the land parcel L.R. No. Suna East/Kakrao/235 which is in dispute to be struck from forming part of the estate of late Mogaka Obare. Further, that the application was brought after the appellants have testified.
- 8.** Counsel submitted that it is trite law parties are bound by their pleadings thus a bona fide and lawful need to align the plaint with the factual position brought by this court's order of 31st March, 2022. He cited the case of Sila v Attorney General (Civil Appeal 224 of 2019) [2025] KECA 498 (KLR) (21 March 2025) (Judgment) in this regard.
- 9.** On the ground that the learned trial magistrate erroneously found that the amendment was not sought on time, counsel urged that the court has wide discretion as far as amendment of pleadings is concerned and the general power is provided for under Section 100 of the Civil Procedure Act and Order 8 Rule 5 (1) of the Civil Procedure Rules. He submitted that the trial magistrate erred in law in holding and finding that the amendment ought to have been made in the pretrial stages before the matter was set down for hearing. Further, that no such rule exists and the magistrate

is fettered with wide discretion to freely allow amendments which can be done at any stage of the proceedings. He placed reliance on the case of Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] KECA 367 (KLR) in this regard.

- 10.** Counsel urged that the amendment sought by the appellants was made in good faith as it was necessitated by the respondents' application for revocation of the grant as evidence was to be adduced on the basis of the proceedings and orders of the court in Kisii High Court Succession Cause 356 of 2014 striking out land parcel L.R. No. Suna East Kakrao/235.
- 11.** It is the appellants' case that the learned trial magistrate erroneously failed to take into consideration relevant factors. He urged that the trial magistrate failed to appreciate the fact that the amendment was necessitated about by the application filed by respondents in the year 2022 seeking the strike out the land parcel in dispute from the grant issued in Kisii High Court Succession Cause No. 356 of 2016.
- 12.** Counsel submitted that despite finding that the amendment sought were based on facts arising from the same circumstances leading to the filing of the suit which did not have the effect of changing the nature of the suit the court erred in law in finding that the said amendments were not brought earlier in the day. He cited the case of Institute for Social Accountability & another v Parliament of Kenya & 2 others; Commission for the Implementation of the Constitution (Interested Party) (Petition 71 of 2013 & 16 of

2023 (Consolidated) [2014] KEHC 7356 (KLR) (Constitutional and Human Rights) (23 January 2014) (Ruling) in this regard.

- 13.** It is the appellants' case that the trial magistrate erred to hold that the appellants sought to fill gaps that were raised on cross examination by the respondents. That the application for striking out the land in dispute was filed after the hearing of the appellants' case thus it was a tool to deny the appellants a chance to rebut the evidence adduced by the 1st and 2nd respondents in their case. Counsel urged that the proposed amendment will advance the cause of justice rather than stifle it by assisting this court conclusively determine the issues before it. Further, that declining the proposed amendment will only lead to the filing of another suit which approach would negate the principles of judicial authority enunciated under Article 159(2) which includes expeditious delivery of justice.
- 14.** Counsel submitted that the trial magistrate failed to take into consideration the fact that the respondents were yet to testify thus having a chance to rebut issues raised in the amendment plaint. No prejudice could be suffered by the respondents as none was disclosed by the respondents in the hearing, which could not be remedied by the appellants being condemned to pay costs.
- 15.** Counsel urged that the trial magistrate failed to consider that the risk of refusal to allow the appellants to amend their pleadings far outweighed any risk of prejudice which the respondents might have been exposed to by allowing the amendment. He placed reliance on the case of St. Patrick's

Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR in this regard.

- 16.** Counsel posited that it is in the interest of justice if the appeal is allowed and the appellants be allowed to amend their pleadings.

Respondent's submissions

- 17.** Counsel for the respondents submitted that the substantive issue for determination arising from the impugned ruling is whether the Learned Trial Magistrate exercised her discretion on the Appellants application for leave to amend their plaint in a judicious manner. Counsel submitted that the trial court directed itself on the right legal principles and exercised discretion in an extremely sound and judicious manner. He urged the court to dismiss the instant appeal.
- 18.** Counsel urged that the filing of the application at an advanced stage of the matter was a well-choreographed move by the Appellants actuated with malice and bad faith, and designed to frustrate the Respondent's defence. He cited Order 8, Rule 3 (1) on amendment of pleadings and urged that the issuance of orders of amendment of pleadings is a discretionary exercise and considering that this Court is sitting on an appeal, it should take that into consideration.
- 19.** Counsel cited the case of Harrison C Kamau vs Blue Shield Insurance Co Ltd (2006) eKLR where the court laid out the guiding principles on amendment of pleadings and additionally, sought to rely on Ochieng & Others vs First National Bank of Chicago Civil Appeal No 147 of 1991 (unreported) as cited with approval in St Patrick's Hill School

Ltd vs Bank of Africa Kenya Ltd [2018] eKLR among other authorities. Counsel urged that it is clear from the impugned ruling that the Learned Magistrate applied her mind to the provisions of the Order 8 Rule 3 as well as the other applicable provisions of the law and authorities in Elijah Kipng'eno arap Bii vs Kenya Commercial Bank Limited (2013) eKLR and Lawrence Owino Omondi vs Kenneth Inea Muyera (2017) eKLR.

20. Counsel submitted that at the time of filing the application for leave to amend their Pleint, the Appellants had previously amended their Pleint and what was sought was leave to make a further amendment. He urged that it is notable, from the proceedings of the lower court, that the pleadings and observations of the trial Magistrate in the impugned Ruling that the existence of the succession matter in which the suit property was confirmed came up during cross examination of the Appellant, Subsequently, the Respondents advocate filed a summons for revocation of grant over the suit property which summons my Lord, was conceded to by the Appellants and effectively revoked. The effect of the revocation was that it burst the Appellants bubble and unearthed their malicious conduct in these proceedings by wilful non-disclosure of material facts known to them.

21. Counsel reiterated that the trial Magistrate exercised her discretion judiciously and there are no grounds upon which the resultant ruling can be interfered with and or set aside. He prayed that the court dismiss the appeal with costs.

Analysis and Determination

22. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR**. It was held as follows;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

23. In **Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** the Court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

24. Having considered the record of appeal, memorandum of appeal and the submissions of the parties, the following issues emerge for determination;

a) Whether the trial court erred in dismissing the appellants' application for leave to amend pleadings

25. Parties to a suit have a right to amend their pleadings at any stage of the proceedings which right is, however, not absolute. It is dependent on the discretion of the court. This discretion should be exercised judiciously and in line with the criteria set out in Order 8 rule 3 of the Civil Procedure Rules which provides as follows;

Amendment of pleading with leave [Order 8, rule 3.]

(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

26. I reiterate that this discretion must however be exercised within established principles. These principles were enunciated by the Court of Appeal in the case of **Central Kenya Ltd v Trust Bank Ltd & 5 others Civil Appeal No..222 OF 1998 [2000] eKLR** thus;

... the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to

the other party which cannot properly be compensated for in costs (see, Beoco Ltd v. Alfa Laval Co. Ltd [1994]4 ALL ER. 464).

27. The nature of the impugned ruling is that it was a discretionary order. When considering a discretionary order on appeal, therefore, there are certain issues to be considered by an appellate court when determining said appeal. In the case of **Easter Bakery v Castelino (1958) EA 461**, the court held;

“Generally speaking this Court will not interfere with the discretion of a Judge in disallowing or allowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded on wrong materials or a wrong principle.”

28. In **Joseph Ochieng & 2 others Trading as Aquiline Agencies versus First National Bank of Chicago [1995] eKLR** the Court of Appeal held that:

“...that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts

but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation:..”

- 29.** In the instant appeal, I have considered extensively the contents of the Further Amended Plaintiff, particularly the amendments introduced vis a vis the initial claim or cause of action. The amendments are glaringly diverse in content from the initial ones. While amendments are often freely allowed in most cases, and at any stage of the proceedings, the court has to bear in mind the effect of the same and the prejudice or injustice an amendment may cause to the adverse party.
- 30.** Looking deeply through the proposed amendments in the trial court, I am inclined to concur with the court, and I hereby do, that it completely sought to introduce a new cause of action which would be prejudicial to the Respondent. The Appellant intended to amend the plaintiff to align with new facts which is untenable in the circumstances. Amendments are not intended to panel beat a party's case since that would amount to stealing a match on the adverse party and distort the doctrine of equality before the law. Thus, the Appellant has not convinced this court that the trial court proceeded on wrong materials or wrong principle in arriving at its decision. It is my considered view that the trial court exercised its discretion judiciously and further, that the appellant has failed to prove otherwise.
- 31.** In the premises, the appeal is dismissed with costs to the Respondent.

Judgment dated, signed and delivered virtually via the Teams Platform this 9th day of December 2025.

**HON. DR. *IUR* NYAGAKA
JUDGE**

In the presence of,

Ms. Mukoya holding brief for Nyamurongi for Appellant

Mr. David Otieno for Jura for Respondent